

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
Tampa Division**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

SAMI AMIN AL-ARIAN, et al.

Defendants.

**MOTION TO DISMISS THE INDICTMENT FOR  
UTILIZATION OF INFORMATION DERIVED FROM A FOREIGN WIRETAP**

Comes now the Accused, Sami Al-Arian, and moves This Honorable Court for entry of an Order dismissing the indictment. In the alternative, the Accused moves that the Government admit that it has utilized evidence either directly or derivatively from a wiretap originated by a foreign government and that a hearing be held to determine whether the U.S. government has engaged in the derivative use of the foreign wiretap and to what extent the evidence that the government seeks to use in the trial of this matter is derived in any way from a foreign wiretap.

As grounds for the foregoing, 18 U.S.C. § 2515 provides in pertinent part:

**Prohibition of use as evidence of intercepted wire or oral communications**

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

On two occasions the defense has requested of the government information concerning the utilization of foreign wiretaps. On both occasions, the government has responded with classic Nixonian answers. On January 27, 2004, the defense wrote the government and requested the following:

We are further requesting whether the government is seeking to utilize any electronic surveillance of Dr. Al-Arian by any law enforcement or intelligence agency of any foreign government. If so, please provide all information in your possession concerning such surveillance, including but not limited to dates, times and places of the surveillance, the exact nature of the surveillance (i.e., wiretap, etc.) and what government and what agency of that government maintained the surveillance.

Discovery Letter from Defense dated January 27, 2004. Certainly within the context of a wiretap everyone understands that use also means derivative use.

The government responded on March 10, 2004: “At this time, the government is not seeking to utilize any electronic surveillance by any law enforcement or intelligence agency of any foreign government.”

On January 5, 2005, after the receipt of additional information regarding foreign electronic surveillance of Dr. Al-Arian, the defense made a second request regarding foreign electronic surveillance (Attachment 1):

We have repeatedly asked you if the government has relied on any evidence of any wiretaps other than those the government has told us about (see letter dated January 27, 2004, attached as Exhibit A, and letter dated March 10, 2004, attached as Exhibit B). We now believe that the government has relied upon in-part evidence derived from an Israeli wiretap.

“The Israeli intelligence provided communications between the [Islamic Jihad] headquarters and [Islamic Jihad] members in the U.S., primarily Bashir Nafi and Sami Al-Arian” during the early 1990s, the former top official said. Nafi, one of those named in the indictment, was deported from the United States to Great Britain in 1996. “This information illustrated the fact that Sami and Bashir were members of the *Majlis Ashura*, or Council of Advisors, of the [Islamic Jihad] operations in Israel and the territories, and allegedly helped to funnel funds collected in the U.S. to Jihad headquarters . . . Since then, U.S. intelligence has determined that Sami remained a member of the council of advisors.”

[Marc Perelman, Israeli Spies Aided Feds in Readyng ‘Jihad’ Case, Forward, February 28, 2003, available at <http://www.forward.com/issues/2003/03.02.28/news1a.html>.]

We believe reliance on information from Israeli wiretaps falls within the parameters of something akin to the silver platter doctrine. In other words, the Israeli tap does not meet the standards of probable cause that would be required in the U.S. and thus the product of the tap would not be permitted under the laws of the United States to be used as evidence against the accused.

On January 25, 2005, the government responded (Attachment 2):

Dear Mr. Moffitt:

This letter is in response to your letter dated January 6, 2005.

Contrary to the claims in your letter, you have not previously asked whether “the government has relied upon in-part evidence derived from an Israeli wire-tap.” Rather, you asked “whether the government is seeking to utilize any electronic surveillance of Dr. Al-Arian by any law enforcement or intelligence agency of any foreign government.” Moffitt 01/27/04 letter at page 2 (emphasis added). That is a totally different question. We answered that question in the negative. Zitek 03/10/04 letter at page 1-2.

In any event, under Fed. R. Crim. P. 16(a)(1)(B)(ii), the government must disclose to a defendant any relevant written or recorded statement by the defendant if the statement is within the government’s possession, custody or control; and the attorney for the government knows – or through due diligence could know – that the statement exists. Through the discovery process, you have received all the statements to which you are entitled pursuant to this provision of Rule 16.

While we find Mr. Zitek’s logic interesting, what seems to be clear is that this is not an answer to the question of the accused. What the government seems to be saying by its response is that they possess no statements of Dr. Al-Arian that were the direct product of a foreign wiretap. However, what they do not say is whether they have utilized any evidence derived from the foreign wiretap of Dr. Al-Arian, *i.e.*, while not in possession of the actual statements made by Dr. Al-Arian on the wiretap, they clearly could be in possession of foreign reports and analysis of the wiretaps. They clearly could also be in possession of leads and other investigative materials derived from the foreign wiretap. Derivative information from the foreign wiretaps could form the basis of the FISA request in this matter. The government’s answer that they

currently possess no Rule 16 material answers none of these questions, and in fact is a non-answer with respect to the derivative use of an foreign wiretap.

The defense believes that evidence derived from the foreign wiretaps has already been utilized in this matter in proceedings such as the detention proceeding. The Court and presumably the prosecution know there are many ways to utilize the products of a wiretap derivatively without possessing the actual statements of the accused.

Here the government has answered the question raised by the defense with obfuscation and misdirection. Whether the government is relying in any way on a wiretap undertaken by a foreign government is relevant to the determination of the numerous issues in this case.

WHEREFORE the accused requests that if the government persists in not answering the direct question about the utilization of evidence derived from a foreign wiretap that the indictment in this case be dismissed; alternatively, that the government answers the question regarding foreign wiretaps and if the answer is in the affirmative the accused requests a hearing to determine what if any evidence is derived from the foreign wiretap.

Dated: 9 February , 2005

Respectfully submitted,

/s/ William B. Moffitt

WILLIAM B. MOFFITT, ESQ.

(VSB #14877)

Cozen O'Connor

1667 K Street, NW

Washington, D.C. 20006

Telephone: (202) 912-4800

Telecopier: (202) 912-4835

LINDA MORENO, ESQ.

1718 E. 7<sup>th</sup> Avenue

Suite 201

Tampa, Florida 33605

Telephone: (813) 247-4500

Telecopier: (813) 247-4551  
Florida Bar No: 112283

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_ of February, 2005, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ William B. Moffitt  
William B. Moffitt  
Attorney for Sami Al-Arian